

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.89 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

NEW SORATHIA ENGINEERING CO. - Applicant(s)

Versus

COMMISSIONER OF INCOME-TAX - Respondent(s)

Appearance :

MR KH KAJI for Applicant(s) : 1,

MR TANVISH U BHATT for Respondent(s) : 1,

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 25/01/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. The Income-tax Appellate Tribunal, Ahmedabad Bench 'C,' has referred the following question under Section 256(1) of the Income-tax Act, 1961 (the Act) at the instance of the

assessee:

“Whether on the facts and in the circumstances of the case, the Tribunal is right in law in upholding the penalty u/s. 271(1)(c) in respect of cash credits aggregating to Rs.61,000/- ?

2. Before advertng to facts it is necessary to take note that the applicant-assessee had proposed the following five questions in its reference application but, according to the Tribunal, only question No.1 deserved to be referred because other questions are either repetitive or based on discussions of certain judicial decisions:

(1) Whether on the facts and in the circumstances of the case, the Tribunal is right in law in upholding the penalty u/s. 271(1)(c) in respect of cash credits aggregating to Rs.61,000/- ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in rejecting and/or not adjudicating the contention that the penalty as imposed was for “concealment or furnishing inaccurate particulars of its income” and therefore, bad in view of the direct Gujarat High Court decision in CIT V/s. Manu Engineering Works (122 ITR

306).

- (3) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in rejecting and/or not adjudicating the contention that the explanation 1 to Sec. 271(1)(c) can not be relied upon because it is not invoked in the notice ?
- (4) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that in the absence of confirmations, explanation 1 applied when in fact the confirmations of the creditors were there as recorded in paragraph 12 of the Tribunal's order on assessment and in the paper books filed in assessment appeal before the CIT (A) as also before the Tribunal?
- (5) Whether on the facts and in the circumstances of the case, the Tribunal is right in law in rejecting and/or not adjudicating the contention that if Explanation 1 did not apply in view of the confirmations, no penalty can be imposed in view of the direct Gujarat High Court decision in CIT v/s. Vinaychand Harilal (120 ITR 752) holding that cash credit is not income at the time of filing of the return but it becomes income at the time of passing of

the assessment order, and therefore, section 271(1)(c) does not apply to cash credits ?

3. The Assessment Year is 1981-82. The assessment came to be framed under Section 144 of the Act wherein one of the additions was in relation to cash credits amounting to Rs.71,000/- (the Tribunal has found that the correct amount should be 61,000/-). The assessee did not succeed in quantum proceedings and the addition of Rs.61,000/- came to be confirmed by the Tribunal. The matter rested at that stage in so far as quantum proceedings are concerned.
4. The Assessing Officer initiated penalty proceedings under Section 271(1)(c) of the Act and levied penalty by recording as under:

“9. After ITAT's order, a fresh notice u/s. 271(1)(c)/274 was served on the assessee on 15-7-86. So far the assessee has not furnished any explanation in response to that show cause notice. I am, therefore, satisfied that the assessee has no reasonable explanation to offer against the charge of concealment or furnishing inaccurate particulars of income. Therefore, in this case explanation 1 to Sec. 271(1)(c) is clearly applicable. I, therefore, levy penalty u/s. 271(1)(c) of the I.T. Act amounting to Rs.50,893/- as calculated below:-”

5. The assessee carried the matter in appeal before the CIT (A) who upheld the penalty by observing :

“..... Therefore, Rs.61,000/- clearly is income which is concealed or in which inaccurate particulars of income have been furnished.”

6. The assessee, therefore, filed second appeal before the Tribunal but did not succeed. One of the contentions raised before the Tribunal was based on a decision of this Court in the case Commissioner of Income-tax, Gujarat-III Vs. Manu Engineering Works, [1980] 122 ITR 306 (Guj.). It was submitted on behalf of the assessee that the penalty could not be sustained in absence of the clear-cut finding by the Assessing Officer while levying penalty i.e. while passing the order of penalty it was incumbent upon the Assessing Officer to state whether penalty was being levied for concealment of particulars of income by the assessee or whether any inaccurate particulars of income had been furnished by the assessee. That both the Assessing Officer and the Commissioner (Appeals) had stated that the assessee was liable to be penalized for either of the offences and hence, the imposition of penalty was bad in law.
7. Mr. K.H. Kaji, learned advocate appearing on behalf of the applicant-assessee, reiterated the aforesaid submission by

placing reliance on the decision of this Court in case of Commissioner of Income-tax Vs. Manu Engineering Works (supra) as well as A.M. Shah and Company Vs. Commissioner of Income-tax, [1999] 238 ITR 415 (Guj.) to submit that the Tribunal ought to have quashed the penalty in absence of a specific charge in the penalty order.

8. Mr.T.U.Bhatt, learned Standing Counsel appearing on behalf of the revenue, contended that the Tribunal had not recorded any finding on this issue and hence, at best, it would constitute an error apparent on record entitling the assessee to seek rectification of order of the Tribunal. According to him, once the contention was raised before the Tribunal and not dealt with by the Tribunal it could not be stated that the Tribunal had recorded any finding which would make the order bad in law so as to require interference.
9. It is an admitted position that the decision of this Court in the case of Commissioner of Income-tax Vs. Manu Engineering Works (supra) had been pressed into service on behalf of the applicant-revenue before the Tribunal. As can be seen from the impugned order of the Tribunal dated 28th April, 1994 though the Tribunal has set out the citation in the list of authorities reproduced in Paragraph No.5 of its

impugned order no finding as such is recorded on the said issue. In such circumstances, it could be stated that the Tribunal has not adjudicated upon the said contention, or it could be stated that once the contention was raised and recorded by the Tribunal it is deemed to have been rejected in absence of any specific finding.

10. In the facts of the present case the subtle difference between the two stages would not matter. It is nobody's case, and it is not possible to contend, that the Tribunal was not bound by a decision of the jurisdictional High Court, especially when its attention was invited to the said decision. Therefore, whether the Tribunal has recorded any finding or not becomes immaterial. In the facts as are available on record it is apparent that the ratio of a decision of this Court in the case of Commissioner of Income-tax Vs. (supra) applies on all fours.

11. In the case of Commissioner of Income-tax Vs. Manu Engineering Works (supra) this is what is laid down by this Court at Page No.310 of the Reports:

“..... We find from the order of the IAC, in the penalty proceedings, that is, the final conclusion as expressed in para. 4 of the order: “I am of the

opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income". Now, the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down."

The penalty order and the order of Commissioner (Appeals) show that no clear-cut finding has been reached. The Tribunal has failed to appreciate this legal issue. Applying the ratio to the facts of the case it is apparent that the order of penalty cannot be sustained and the Tribunal could not have sustained the same. The Tribunal having failed to take into consideration and deal with the decision of the jurisdictional High Court it would constitute an error in law which goes to the very basis of the controversy involved and hence, the impugned order of the Tribunal cannot be upheld.

12. In the view that the Court has taken it is not necessary to reproduce and deal with other contentions raised by the learned counsel on facts and merits of the matter in the fact situation.
13. In the result, the question is answered in the negative i.e. in favour of the assessee and against the revenue. The Tribunal was not right in upholding the penalty under Section 271(1) (c) of the Act, for the reasons stated hereinbefore.
14. The reference stands disposed of accordingly. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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